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In the

Supreme Court of the United States

October Term, 1980

GERALD W. BERG,
Petitioner,

v.

UNITED STATES OF AMERICA

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The Government's Brief in Opposition is such an amazing distortion of the "cert-worthiness" of this case as to warrant a brief response.

I

The Government is unable (Opp.Br. 1-2) to cite an iota of credible evidence that "petitioner participated in a scheme by which he and certain other demolition contractors in Baltimore insured that they received the City's

demolition business at fixed and artificially inflated prices." As the Petition pointed out (pp. 7-8), there is no such evidence. Such an evidentiary void makes the constitutional and statutory rulings below all the more suspect. And the Government's studied effort to avoid review of the decision becomes quite hollow.

II

The Government asserts (Opp.Br. 3) that petitioner's three RICO arguments have not been accepted by any federal court and that "three virtually identical claims" were denied review by this Court in *Mandel* v. *United States*, No. 79-1029, cert. denied, April 14, 1980.

As the Government well knows, such a denial of certiorari is not a precedent. More importantly, the opinion of the Fourth Circuit in this case is the first appellate opinion to develop these issues in a precedent-setting and reviewable fashion. In *Mandel*, the Fourth Circuit merely entered a summary affirmance of the convictions, there being no discussion whatever of the issues. But here the Fourth Circuit has discussed the issues at length. It has created a fertile base for invoking this Court's certiorari jurisdiction.

The Government errs in suggesting that "many" federal courts have "rejected" these RICO claims, particularly those involving the constitutionality of RICO forfeitures and the multiple punishment implications of RICO-mail fraud convictions. Those issues were briefed before the Fourth Circuit in *Mandel*, but it is hazardous to suggest that the summary affirmance in that case represented a studied rejection of the issues following plenary consideration.[1] But in no other federal court have the forfeiture and

[1] In *Mandel*, the Fourth Circuit summarily affirmed the convictions by an equally divided vote, having reheard the case *en banc*. 602 F.2d 653. Upon the rehearing, the *Mandel* petitioners briefed the RICO

multiple punishment issues under RICO even been raised, much less resolved or rejected. The very novelty as well as the importance of the Fourth Circuit rulings on these issues adds to the "cert-worthiness" of this case.

III

The Government argues (Opp.Br. 3-4) that petitioner's claims respecting the constitutionality of RICO forfeitures are "without merit." They are said to be "without merit" because a RICO forfeiture does not amount to a "forfeiture of estate" in the constitutional and common law sense, and because a RICO forfeiture is substantially like an *in rem* forfeiture of property used in the conduct of a criminal enterprise.

But on certiorari the problem is not whether the petitioner is wrong or the Government is right on the merits. The question is whether the decision below involves an important and novel constitutional question that should be addressed and resolved by this Court. On that score, the Government nowhere denies the importance, the novelty or the recurring nature of this forfeiture question. There is no precedent in this Court, or in any other court, that even suggests that a partial forfeiture of the RICO variety does not fall within the constitutional and statutory ban on "forfeiture of estate." But the Fourth Circuit has so held. Such a ruling by a federal court of such eminence deserves plenary consideration by this Court.

It will be time enough to determine if petitioner's claims are "without merit" once this important constitutional enigma is under consideration.

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forfeiture and multiple punishment issues. The Government, however, chose not to respond to those arguments, and filed no brief whatever on the rehearing. But the Government's brief before the original panel in *Mandel* did address the forfeiture issue. The panel did not reach or discuss the forfeiture issue. 591 F.2d 1347.

IV

The Government argues (Opp.Br. 4-5) that the multiple punishment issue "is simply not presented by the sentence imposed on petitioner." Not so, for several reasons.

First, contrary to the Government's suggestion, the sentences imposed on petitioner for his 12 mail fraud convictions were not identical with, and thus not totally concurrent with, the RICO sentences.[2] On the mail fraud

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[2]Forfeiture of the enterprise interest of a convicted RICO defendant is made mandatory by Section 1963. In this case the jury determined that the petitioner had a 50% interest in the Buzz Berg Wrecking Company, Inc., and the trial judge entered an order restraining petitioner from disposing of all or any part of that interest. The final forfeiture order becomes a mere formality, awaiting only a determination of the precise forfeitable interest.

As to the fines and imprisonment terms imposed on petitioner for all his 12 mail fraud convictions and his RICO conviction, see the following docket entry of judgment dated December 16, 1977:

JUDGMENT AS TO DEFENDANT GERALD W. BERG: The Defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Four (4) Years as to each of [the mail fraud] Counts Nos. 1 through 3, inclusive, 5, 9, 15, 16, 22, 24 through 27, inclusive, [the RICO Count] 29, and [the obstruction Count] 40. Said terms of imprisonment to run concurrently with each other, making a total term of Four (4) Years imprisonment. Defendant shall become eligible for parole, at such time as the parole Commission may determine, pursuant to U.S.C., Title 18, Section 4205(b)(2). IT IS ORDERED that the Defendant pay a Fine of One Thousand Dollars ($1,000.00) as to each of [the mail fraud] Counts Nos. 1 through 3, inclusive, 5, 9, 15, 16, 22, 24 through 27, inclusive, and to pay a Fine of Fifteen Thousand Dollars ($15,000.00) as to [the RICO] Count No. 29, and to pay a Fine of Five Thousand Dollars ($5,000.00) as to [the obstruction] Count No. 40. Said fines imposed to be non-cumulative, making a total fine of Fifteen Thousand Dollars ($15,000.00). Order (Northrop, C.J.) dated December 16, 1977.

[Note: The Fourth Circuit reversed petitioner's conviction under the obstruction count, No. 40, and directed that a judgment of acquittal be entered. The imprisonment and fine imposed for the Count 40 violation should therefore be deleted from the foregoing judgment.]

charges, petitioner was fined $1000 on each conviction, totalling $12,000 and given concurrent imprisonment terms of 4 years on each mail fraud conviction. On the RICO conviction, petitioner was fined $15,000, imprisoned for 4 years (concurrent with the other terms), and ordered to forfeit his interest in the Buzz Berg Wrecking Company, Inc. By any calculation, the mandatory forfeiture and the additional $3000 in fines must be considered additional and cumulative punishments imposed for the RICO violation. The mail fraud convictions did not encompass either forfeiture or the extra $3000 fine.

Second, the Government's complaint stemming from the sentences comes too late. The Government made no such complaint in the Fourth Circuit. And the Fourth Circuit obviously did not feel inhibited by the so-called concurrent sentence doctrine from reaching and resolving the multiple punishment issue. To invoke the concurrent sentence doctrine at this late date is to insulate from review by this Court an important and questionable ruling on the recurring issue of multiple punishment.

Third, even were the mail fraud punishments deemed identical and concurrent with the RICO punishments, the concurrent sentence doctrine stands as no absolute bar to review by this Court. The doctrine itself was substantially undermined in *Benton* v. *Maryland,* 395 U.S. 784, 790-91 (1969), to the point where it is now considered to be "a discretionary matter," *Barnes* v. *United States,* 412 U.S. 837, 848, n.16 (1973), that "does not, of course, affect our jurisdiction," *Andresen* v. *Maryland,* 427 U.S. 463, 469 n.4 (1976), to review the validity of a particular concurrent sentence.

The doctrine has apparently been reduced, in its discretionary application, to those few situations where no collateral consequences or stigma can be said to attach to a

concurrent conviction. See, e.g., *United States* v. *Vargas,* 615 F.2d 952, 959-60 (2d Cir. 1980). A recent Eighth Circuit opinion has declined to apply the doctrine to avoid reviewing a concurrent RICO sentence (which did not include a forfeiture) "because of the possible stigma stemming from the connotations surrounding the offense of 'racketeering.' " *United States* v. *Anderson,* slip opinion, p. 3, n.2 (8th Cir. Nos. 79-1809, 79-1827, Aug. 7, 1980). The same result should obtain here.

In any event, the Government's belated and questionable use of the concurrent sentence should not be sanctioned by a denial of certiorari. If the doctrine has any merit in this case, it can be assessed and applied, if found appropriate, upon plenary review of all the questions presented in this case.

V

The Government reiterates (Opp.Br. 5-6) its consistent contention that the RICO statute is designed to punish anyone who maintains an interest in or controls an enterprise through a "pattern of racketeering activity," regardless of whether that person is connected with organized crime. That, of course, is the standard argument of prosecutors who seek to turn the Organized Crime Control Act into a weapon in the war against white collar crime of the non-organized variety.

But reiteration of this argument, however often it has been accepted by lower courts, does not constitute an answer to the reviewability of the statutory construction problem posed to this Court. Many lower courts are becoming increasingly disturbed as the Government continues to push for broad interpretations and applications of a statute that was carefully crafted to meet a specific category of criminal activity, engaged in by organized

crime elements in this county. See *Iannelli* v. *United States*, 420 U.S. 770, 789 (1975). As was said by a former Assistant Attorney General, Herbert J. Miller, RICO

> ". . .is not a subtle statute: its harsh provisions . . . are designed to administer strong medicine, to root out Mob elements. Like all strong medicine, however, RICO has some untoward side effects and is subject to abuse.
>
> "One victim may be the patient himself – the legitimate business community. Increasingly, RICO prosecutions are being brought against enterprises in no way connected with organized crime or engaged in what is ordinarily thought of as racketeering. And the Act, with its draconian forfeiture penalty, has become a mighty club in the hands of a prosecutor seeking to exact a guilty plea." Miller & Waxman, A Blunt Instrument: Mob Not Only Victim of RICO, *Legal Times of Washington*, Nov. 28, 1978, at 14, col. 1.

This is indeed the occasion for this Court to determine once and for all whether RICO is to be confined to its stated purpose, or whether it is to be used as a dragnet to catch all who are otherwise punishable under the mail fraud statute and who are not part of organized crime syndicates.

VI

The Government completely misses the certiorari point about the propriety of the United States Attorney's former law firm representing the chief government witness at petitioner's trial. See Opp.Br. 7. The Government treats this question as a "factual issue," correctly resolved below by the prosecutorial statements that the United States

Attorney recused himself from making any decisions involving the witness.

But the certiorari point involves something more than a question whether the United States Attorney did or did not effectively recuse himself in this respect. The question is whether the proper administration of federal criminal justice can tolerate the "appearance of impropriety" stemming from the conceded representation of the chief government witness by the prosecutor's former law firm throughout the course of petitioner's trial. The United States Attorney did not recuse himself from the prosecution of the petitioner; nor were any steps taken to disqualify the law firm from representing the witness, who at one time had been a client of the United States Attorney.

The Government has said nothing to dissipate the appropriateness of granting certiorari to determine whether such entanglements by the chief government prosecutor are in conformity with the prosecutorial and professional standards of conduct.

CONCLUSION

The Government's Brief in Opposition has succeeded in adding to the appropriateness of granting certiorari.

Respectfully submitted,

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